Attorney General & Ors v Geoffrey Robertson

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEALS NO 02–11 OF 2001(W), 02–12 OF 2001(W), 02–13 OF 2001(W), 02–14 OF 2001(W), 02–15 OF 2001(W), 02–16 OF 2001(W), 02–17 OF 2001(W) AND 02–18 OF 2001(W)

MOHAMED DZAIDDIN CHIEF JUSTICE, ABDUL MALEK AHMAD AND SITI NORMA YAAKOB FCJJ

24 APRIL 2002

Legal Profession *— Admission — Ad hoc — Queen's counsel — Requirement of Bahasa Malaysia in s 11 (2) — Whether applicable under s 18 — Legal Profession Act 1976 ss 11 (2) & 18*

The respondent, who was not a citizen of, or a permanent resident in Malaysia had applied for ad hoc admission to practise as an advocate and solicitor of the High Court Malaya under s 18(1) of the Legal Profession Act 1976 ('the Act') for the purpose of acting as leading counsel for the defendant in four defamation actions. The majority judgment of the Court of Appeal stressed that the fate of the application by the respondent depended entirely on the interpretation of s 18 of the Act (see [2001] 4 MLJ 257). Leave to appeal to this court was granted on the issue of whether the prerequisite under s 11(2) of the Act must be fulfilled in order for the respondent to be admitted and enrolled as an advocate and solicitor of the High Court of Malaya pursuant to s 18 of the Act.

Held, dismissing the appeal:

(1) Section 18 of the Act opened with the words, 'Notwithstanding anything contained in this Act' and this surely means that the said section was to be read without any regard to any other provision of the Act. The opening words could easily have been left out if the intention was otherwise (see p 454H–I).

(2) Both s 11(2) and s 18 of the Act came about at the same time through Act A567, which came into force on 16 December 1983. Since the coming into force of the Act on 1 June 1977 until then, there was no provision for a non-Malaysian qualified person to apply to be admitted under special circumstances. If it was the intention of the legislature to make a non-Malaysian qualified person who applied under s 18 of the Act to fulfill the requirements of s 11, which included s 11(2) of the Act when s 18 of the Act came into force, then the Act would have expressly stated so either in s 18 itself or through some other provision in the Act (see p 456E–F).

(3) Thus the application of s 11 of the Act, in particular s 11(2), to a non-Malaysian qualified person did not arise as all he had to fulfill were the requirements stated in s 18 of the Act itself, a view fortified by the inclusion of the opening words of that section (see p 457A).

[Bahasa Malaysia summary

Responden, yang bukannya merupakan warganegara, atau seorang pemastautin tetap Malaysia telah memohon untuk kemasukan ad hoc untuk beramal sebagai seorang peguambela dan peguamcara Mahkamah Tinggi Malaya di bawah s 18(1) Akta Profesyen Undang-undang 1976 ('Akta tersebut') bagi tujuan bertindak sebagai peguam utama untuk defendan dalam empat tindakan memfitnah. Penghakiman majoriti Mahkamah Rayuan menekankan bahawa nasib permohonan yang dibuat oleh responden bergantung semata-mata atas pentafsiran s 18 Akta tersebut (lihat [2001] 4 MLJ 257). Kebenaran untuk merayu kepada mahkamah ini telah diberikan atas isu sama ada syarat yang dikenakan di bawah s 11(2) Akta tersebut haruslah dipenuhi demi untuk memasukkan responden dan mendaftarkan beliau sebagai seorang peguambela dan peguamcara Mahkamah Tinggi Malaya selaras dengan s 18 Akta tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 18 Akta tersebut dimulakan dengan perkataan-perkataan, 'Tanpa menghiraukan apa-apa yang terkandung di dalam Akta ini' dan ini pastinya bermakna bahawa seksyen tersebut haruslah dibaca tanpa menghiraukan mana-mana peruntukan lain Akta tersebut. Perkataan-perkataan permulaan itu tentunya boleh dikecualikan jika niat adalah sebaliknya (lihat 454H–I).

(2) Kedua-dua s 11(2) dan s 18 Akta tersebut diterbitkan pada masa yang sama melalui Akta A567, yang mula berkuatkuasa pada 16 Disember 1983. Sejak berkuatkuasanya Akta tersebut pada 1 Jun 1977 sehingga ketika itu, tidak terdapat peruntukan bagi seorang bukan warganegara Malaysia yang berkelayakan untuk memohon supaya dimasukkan di bawah keadaan-keadaan khas. Jika adalah niat perundangan untuk menjadikan seorang bukan warganegara yang berkelayakan yang memohon di bawah s 18 Akta tersebut untuk memenuhi syarat-syarat s 11, yang mana termasuk s 11(2) Akta tersebut ketika s 18 Akta tersebut mula berkuatkuasa, maka Akta tersebut tentunya akan dengan jelasnya menyatakan sedemikian sama ada di dalam s 18 itu sendiri atau melalui peruntukan lain di dalam Akta tersebut (lihat ms 456E–F).

(3) Oleh itu pemakaian s 11 Akta tersebut, khususnya s 11(2), kepada seorang bukan warganegara Malaysia yang berkelayakan tidak berbangkit kerana apa yang perlu beliau penuhi ialah syarat-syarat yang dinyatakan di dalam s 18 Akta itu sendiri, satu pandangan yang diperkukuhkan oleh kemasukan perkataan-perkataan permulaan seksyen itu (lihat ms 457A).]

Notes

For cases on ad hoc admission, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1345–1363.

Legislation referred to

Advocates and Solicitors Ordinance 1947 s 8A
Legal Profession Act 1976 ss 3, 11(1), (2), 18(1)

Appeal from: Civil Appeals No W–02–810 of 1999, W–02–811 of 1999, W–02–812 of 1999 and W–02–813 of 1999 (Court of Appeal, Kuala Lumpur)

Abdul Aziz Abdul Rahim (Senior Federal Counsel) (*Nizam Zakaria* with him) for the first appellant.

V Sivaparanjothi (*Rutheran Sivagnanam* and *Wong Hee Them* with him) (*V Siva & Partners*) for the second, third, fourth and fifth appellants.

Muhammad Shafee Abdullah (*Azhar Azizan Harun* and *Karina Wong* with him) (*Shafee & Co*) for the respondents.

Gauri Kumarashwaran for the Kuala Lumpur Bar Committee.

Edmund Bon for the Bar Council.

Abdul Malek Ahmad FCJ (delivering judgment of the court): On 16 June 1999, the respondent, who is not a citizen of, or a permanent resident in, Malaysia had applied for ad hoc admission to practise as an advocate and solicitor of the High Court of Malaya under s 18(1) of the Legal Profession Act 1976 ('the LPA') for the purpose of acting as lead counsel for the defendant, Raphael Pura, in four defamation actions instituted by the second, third, fourth and fifth appellants against him.

The said s 18(1) of the LPA reads:

> Admission in special cases
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> (1) Notwithstanding anything contained in this Act, the court may, for the purpose of any one case and subject to the following sub-sections, admit to practise as an advocate and solicitor any person who, if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court and no person shall be admitted to practise as an advocate and solicitor under this sub-section unless —
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> (a) for the purpose of that particular case he has, in the opinion of the court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and
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> (b) he has been instructed by an advocate and solicitor in Malaysia.

The grounds supporting the said application were that the respondent possessed special qualifications and experience of a nature not available amongst advocates and solicitors in this country although the respondent's affidavit did not state in detail the unusual or difficult issues which would arise in the suits and that he was conversant with the Federal Constitution.

The Bar Council had affirmed an affidavit, through its secretary, strongly supporting the application while the Kuala Lumpur Bar Committee at the hearing had informed the High Court that they had no objections and were in fact supporting the application.

The first appellant was of the view that the defamation actions did not involve novel and complex questions on the laws of libel and slander and that the defences of justification, fair comment and qualified privilege had been successfully argued in a number of similar cases by eminent local advocates and solicitors. Thus, there was no reason for the respondent to come into the picture. Learned counsel for the other appellants voiced the same view.

Following the arguments, despite the respondent's otherwise impressive academic record, the learned High Court Judge (Faiza Tamby Chik J) had, on 27 September 1999, dismissed the applications.

In the appeal before the Court of Appeal, the decision on 27 June 2001 was divided. Haidar Mohd Noor JCA (as he then was) and Abdul Kadir Sulaiman JCA allowed the appeal while Abdul Hamid Mohamed JCA dismissed it.

The majority judgment of the Court of Appeal stressed that the fate of the application by the respondent depended entirely on the interpretation of s 18 of the LPA. The relevant part of that judgment reads:

> So as to harmonise the interests of the advocates and solicitors of Malaysia with the wishes of a particular litigant who desires to retain a particular foreign lawyer, certain stringent conditions are imposed by s 18 upon foreign lawyers as so spelt out in sub-s (l)(a) thereof. If, however, this foreign lawyer meets the stringent conditions imposed by the sub-section, there should not be any grouse on the part of the local advocates and solicitors for giving way to this foreign lawyer because the qualifications or experience is of a nature not available amongst them. The court having satisfied of the qualifications or experience required, is then empowered to admit to practise as an advocate and solicitor this foreign lawyer to represent the particular litigant in respect of any particular case this foreign lawyer is called upon to represent. However, before admitting him, sub-s (3) thereof requires the court to have regard to the views of each of the persons served with the applications. In the instant case before the learned judge, the views of the two bodies concerned with the promoting and safeguarding the interests of the local advocates and solicitors, ie the Bar Council and the Kuala Lumpur Bar Committee, are of utmost importance in assisting the judge to make a decision as to whether the appellant should be granted his applications. But for extraneous reason, the learned judge ignored their views and decided to rely on the general assertion of the Attorney General and the plaintiffs that the cases are of ordinary types without having regard to the substance and the evidence supporting the applications. Unless the stand taken by the said two bodies representing the local advocates and solicitors are suspect, which we do not think so, they are in a better position to assist the court in determining the fate of the applications of the appellant.

Leading senior federal counsel in the Court of Appeal, however, while contending that the qualifications or experience of the respondent was not

their main objection, pointed out that in the light of the words 'if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court' appearing in s 18 of the LPA, it implies that the respondent must first meet the requirements of s 11(2) of the LPA.

At this juncture, it is appropriate to reproduce s 11 of the LPA which states:

> Qualifications for admission
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> (1) Subject to s 14, a qualified person may be admitted as an advocate and solicitor if he —
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> (a) has attained the age of eighteen years;
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> (b) is of good character and
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> (i) has not been convicted in Malaysia or elsewhere of a criminal offence as would render him unfit to be a member of his profession, and in particular, but not limited to, an offence involving fraud or dishonesty;
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> (ii) has not been adjudicated bankrupt and has not been found guilty of any of the acts or omissions mentioned in paras (a), (b), (c), (d), (e), (f), (h), (k) or (1) of sub-s (6) of s 33 of the Bankruptcy Act 1967;
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> (iii) has not done any other act which, if being a barrister or solicitor in England, would render him liable to be disbarred, [disqualified] or suspended from practice; or
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> (iv) has not been, or is not liable to be, disbarred, [disqualified] or suspended in his capacity as a legal practitioner in any other country;
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> (c) is either a Federal citizen or a permanent resident of Malaysia;
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> (d) has satisfactorily served in Malaysia the prescribed period of pupillage for qualified persons.
>
> (2) As from the 1 January 1984, no qualified person shall be admitted as an advocate and solicitor unless, in addition to satisfying the requirements of sub-s (1), he has passed or is exempted from the Bahasa Malaysia Qualifying Examination.

On this argument, the majority judgment states:

> We see no merit in the contention because firstly, this s 18 is not of general application. This section makes provisions for admission in special cases applicable to a foreign lawyer whereas s 11 is of general application applicable to either a Federal citizen or a permanent resident of Malaysia as so stipulated by sub-ss (1)(c) thereof. Secondly, the opening words of s 18(1) itself — 'Notwithstanding anything contained in this act' — takes it out of the ambit of s 11 except that the applicant therein cannot be any person other than a person having the qualification to be an advocate and solicitor …
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> Similarly in the instant case of the appellant, by the nature of the applications and the special provisions provided by s 18 of the act, it cannot be the intention of the legislature to impose the requirements of s 11(2) upon him.

The dissenting judgment of the Court of Appeal touched on the similarity of s 18(1) of the LPA to s 8A of the Advocates and Solicitors Ordinance 1947 ('the Ordinance') which was the forerunner of, and repealed by, the LPA. The relevant extract reads:

> We see that s 18(1) of the Legal Profession Act 1976 now in force is very similar to the provision of s 8A(1) of the Advocates and Solicitors Ordinance 1947. In other words, after about six years after the enactment of the Legal Profession Act 1976, with a different provision regarding ad hoc admission, the legislature decided to re-enact the earlier provision as was in the Ordinance with a slight change ie the words 'would be a qualified person within the meaning of this Ordinance' were replaced with the words 'would be eligible to be admitted as an advocate and solicitor of the High Court'.
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> Why the change in the words 'would be a qualified person' with the words 'would be eligible to be admitted'?
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> To my mind, the answer lies in the introduction of the requirement of passing or is exempted from the Bahasa Malaysia Qualifying Examination. That requirement is an additional requirement. The definition of a 'qualified person' in s 3 of the Legal Profession Act 1967 was not changed. Prior to the introduction of s 11(2) a 'qualified person' was eligible to be admitted provided he fulfilled the requirements of the then s 11 (now 11(1)). But with the introduction of s 11(2) that is not enough. He must also pass or is exempted from the Bahasa Malaysia Qualifying examination. If the words 'a qualified person' were retained, that would not cover the requirement of s 11(2) because that requirement is not one of the requirements that makes a person a 'qualified person' as defined in s 3. Hence the word 'eligible' is used.
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> What do the words 'if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court' mean?
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> To understand it we have to go back to the normal admission. In the case of a normal admission, to be eligible for admission a person must be a 'qualified person', and he must satisfy the conditions of s 11 including being either a Federal citizen or a permanent resident of Malaysia and has passed or is exempted from the Bahasa Malaysia Qualifying Examination.

Leave to appeal to this court was granted on 1 October 2001 only on the following question:

> Whether the prerequisite under s 11(2) of the Act must be fulfilled in order to be admitted and enrolled as an advocate and solicitor of the High Court of Malaya pursuant to s 18 of the Act?

We are aware that although the question posed only makes mention of the prerequisite of s 11(2) of the LPA, that sub-s is in fact an addition to the requirements of s 11(1) of the LPA before a qualified person can be admitted as an advocate and solicitor.

Section 18 of the LPA opens with the words 'Notwithstanding anything contained in this Act' and this surely means, in our view, that the said section is to be read without any regard to any other provision of the LPA. The opening words could easily have been left out if the intention was otherwise.

A But the learned senior federal counsel for the first appellant and learned counsel for the other appellants have argued that the words 'if he was a citizen of, or a permanent resident in, Malaysia' in that same section implies that 'would be eligible to be admitted as an advocate and solicitor of the High Court' stipulates that the requirements under s 11 of the LPA come into play and consequently, the prerequisite of s 11(2) of the LPA, in B particular, ends up as an absolutely necessary precondition.

A 'qualified person' has been defined in s 3 of the LPA as follows:

> 'qualified person' means any person who —
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> (a) has passed the final examination leading to the degree of Bachelor of C Laws of the University of Malaya, the University of Malaya in Singapore, the University of Singapore or the National University of Singapore;
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> (b) is a barrister at law of England; or
>
> (c) is in possession of such other qualification as may by notification in the Gazette be declared by the... Board to be sufficient to make a person a qualified person for the purposes of this Act.

D It follows that to be admitted as an advocate and solicitor, a qualified person must fulfil the requirements of s 11(1) of the LPA and, since 1 January 1984, the requirement in s 11(2) of the LPA as well.

We then quickly turn to s 18 of the LPA again and find that 'qualified person' has not been used. Instead, it is only 'any person'. This, at first E blush, seems to indicate that a person applying under s 18 of the LPA need not be a qualified person.

But surely that cannot be so. The person who applies under the special circumstances of s 18 of the LPA must also be a qualified person. And that is the very reason, in our considered opinion, why the words that follow F after 'any person' namely 'who, if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted' have been used to denote that the person must be a qualified person as only a qualified person, who is a citizen of, or a permanent resident in, Malaysia would be eligible to be admitted under s 11 of the LPA.

One can then argue that if that is so, the words 'if he was a citizen of, or G a permanent resident in, Malaysia,' could easily be left out but it is our finding that those words have been included to emphasize that s 18 of the LPA is catered for a qualified person who does not belong to that category, that is, he is neither a citizen nor a permanent resident of Malaysia.

For these reasons, we would have to disagree with the finding of the H dissenting judgment in the Court of Appeal that the purpose of changing the words 'would be a qualified person' in s 8A of the Ordinance to 'would be eligible to be admitted as an advocate and solicitor of the High Court' in s 18 of the LPA was because of the new s 11(2) of the LPA. That view cannot be correct as Malaysian citizenship or permanent residence was only one of the requirements of s 11(1) of the LPA, and that condition alone I does not make the qualified person, which term has been defined in s 3 of the LPA as a person who possesses the basic legal qualifications, eligible to be admitted as an advocate and solicitor.

The actual reason why the words were replaced was because under the definition of 'qualified person' in s 3 of the Ordinance, as amended in 1970, the person must be a citizen of, or permanent resident in, Malaysia. The definition appearing in s 3 of the LPA has left out the necessity of being a citizen of, or permanent resident in, Malaysia. We would reiterate that is also the reason why the words 'if he was a citizen of, or a permanent resident in, Malaysia' had been included in s 18 of the LPA.

The necessity for the change, in our view, is because the Malaysian applicant under s 11 of the LPA and the non-Malaysian applicant under s 18 of the LPA is already a 'qualified person', and to say 'would be a qualified person' renders it redundant. A qualified person in either case would be eligible to be admitted as an advocate and solicitor in the High Court if he fulfils the requirements of s 11 of the LPA, if he is a Malaysian citizen or permanent resident, and those under s 18 of the LPA, if he was not.

The question is, must the non-Malaysian applicant under s 18 of the LPA fulfil all the requirements of s 11, in particular s 11(2) of the LPA to be considered eligible to be admitted? With the words 'Notwithstanding anything contained in this Act' in s 18 of the LPA staring at us, it clearly excludes the application of s 11 of the LPA, and so our finding is that the only requirement for the applicant under s 18 of the LPA are those stated in sub-ss (l)(a) and (b) of that section.

It must be observed that both s 11(2) and s 18 of the LPA came about at the same time through Act A567 which came into force on 16 December 1983. Since the coming into force of the LPA on 1 June 1977 until then, there was no provision for a non-Malaysian qualified person to apply to be admitted under special circumstances. If it was the intention of the legislature to make a non-Malaysian qualified person who applies under s 18 of the LPA to fulfil the requirements of s 11, which included s 11(2) of the LPA when s 18 of the LPA came into force, then the LPA would have expressly stated so either in s 18 itself or through some other provision in the LPA.

The explanatory statement to the bill making the amendments states, as regards the addition of s 11(2) of the LPA, through cl 9 of the bill as follows:

> Clause 9 seeks to introduce a new provision whereby as from 1 January 1984, no qualified person shall be admitted as an advocate and solicitor unless, in addition to satisfying the requirements of sub-s (1), he has passed or is exempted from the Bahasa Malaysia Qualifying Examination.

As for the amendment to s 18(1) of the LPA, the explanatory statement at para 5 explains it in the following manner:

> Clause 14 limits the admission of foreign lawyers to practise as advocates and solicitors in any court in Malaysia. It is intended that a foreign advocate and solicitor may only be admitted for the purpose of any particular case where in the opinion of the court he has special qualifications or experience not available amongst advocates and solicitors in Malaysia.

On these considerations, we can only come to the opinion that the application of s 11, in particular s 11(2), of the LPA to a non-Malaysian qualified person does not arise as all he has to fulfil are the requirements stated in s 18 of the LPA itself, a view fortified by the inclusion of the opening words of that section.

We would, therefore, agree with the majority view of the Court of Appeal and dismiss these appeals with costs, having answered the question posed in the negative. We would also order the deposits made be paid out to the respondent to account of taxed costs.

Appeal dismissed.

Reported by Peter Ling